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ONLY)

Attorneys for Plaintiff
INTERSTATE FIRE & CASUALTY COMPANY,
an Illinois corporation,

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA, EASTERN DIVISION

INTERSTATE FIRE & CASUALTY
COMPANY, an Illinois corporation,

Plaintiff,

v.

PACIFIC EMPLOYERS INSURANCE
COMPANY, a Pennsylvania
corporation,

Defendant.

REPUBLIC WESTERN INSURANCE
COMPANY, an Arizona corporation,

Plaintiff in
Intervention,

v.

INTERSTATE FIRE & CASUALTY
COMPANY, an Illinois corporation;
PACIFIC EMPLOYERS INSURANCE
COMPANY, a Pennsylvania
corporation,

Defendants in
Intervention.

Case No. EDCV06-0593 VAP (OPx)

**PLAINTIFF INTERSTATE FIRE &
CASUALTY COMPANY'S REPLY
TO PACIFIC EMPLOYER'S
OPPOSITION TO MOTION TO
RETAX COSTS**

Complaint Filed: June 6, 2006

Trial Date: None

Judge: Hon. Virginia A. Phillips

Date: August 31, 2009

Time: 10:00 a.m.

Ctrm: 2

**[Filed concurrently with: Declaration
of Paul J. Whitfield]**

REPLY - INTERSTATE FIRE & CASUALTY COMPANY'S MOTION TO RETAX COSTS

EDCV06-0593 VAP (OPx)

1 **I. INTRODUCTION**

2 Defendant PACIFIC EMPLOYERS INSURANCE COMPANY ("PEIC")
 3 opposes INTERSTATE FIRE & CASUALTY COMPANY's ("INTERSTATE")
 4 Motion to Retax Costs without providing any legal or factual support. PEIC has
 5 therefore failed to meet its burden to state specifically the documents produced
 6 and the purpose of the document production.

7 Furthermore, PEIC admits that at least some of the costs that it incurred were
 8 for copying documents for its own use and analysis. Costs incurred in making
 9 copies for this purpose are not eligible for reimbursement. Additionally, while
 10 PEIC claims that it obtained documents from the law firm of Varner & Brandt and
 11 used them in support of its motion for summary judgment, those documents were
 12 actually provided to PEIC by INTERSTATE prior to the Verner & Brandt
 13 subpoena. Finally, PEIC claims that it obtained deposition transcripts to prepare
 14 itself to defend claims made by Republic Western Insurance Company ("RWIC"),
 15 despite the fact that PEIC and RWIC stipulated that they would not pursue claims
 16 against each other, prior to the depositions taking place. Since there could be no
 17 legitimate purpose for the depositions transcripts, PEIC should not be able to
 18 recover those costs.

19 As a portion of PEIC's claimed costs were incurred as a result of discovery
 20 that was unnecessary or was never provided to the Court or INTERSTATE, PEIC's
 21 reimbursable costs should be reduced by \$5,132.72.

22 **II. LEGAL ARGUMENT**

23 **A. The Court Reviews a Motion to Tax Costs De Novo**

24 PEIC raises the issue that the clerk of the Court already granted PEIC's
 25 Motion to Tax Costs over the objections of Interstate. However, a Motion to Retax
 26 Costs is reviewed by the Court de novo. *In Re Paoli R.R. Yard PCB Litig.*, 221
 27 F.3d 449, 461 (3rd Cir. 2000); *Sharon v. Yellow Freight System, Inc.*, 985 F.Supp.
 28 1274, 1275 (D. Kan. 1997). Additionally, the onus lies on the party seeking

1 reimbursement of its costs to be specific in its description of the documents
 2 produced and the purpose of the document production. *El Dorado Irrigation Dist.*
 3 *v. Traylor Bros.*, 2007 U.S. Dist. LEXIS 14440, *31 (E.D. Cal. 2007) (it is not
 4 sufficient to merely state that copies were “necessarily obtained”).

5 **B. PEIC Is Not Entitled to Reimbursement For the Copying of**
 6 **Certain Documents**

7 **1. By Its Own Admission, PEIC Obtained Documents Solely**
 8 **For Its Own Use**

9 PEIC argues that it copied documents from Greene, Broillet & Wheeler and
 10 Cochran, Cherry, Givens & Smith, PEIC for the purpose of “determining the facts
 11 of the case and PEIC’s coverage defenses” as well as “determining whether the
 12 over \$10.5 Million settlement of the Underlying Actions was reasonable.” See
 13 PEIC’s Opposition, p. 3:22-23. While these may be legitimate tasks to conduct
 14 when confronted with a lawsuit, the fact remains that the documents copied to
 15 fulfill these tasks, and not for any other purpose, were copies made solely for the
 16 use of counsel. PEIC’s statements amount to an admission of this fact.

17 Due to the fact that PEIC obtained these documents solely for its own use,
 18 PEIC should not be permitted to seek reimbursement of costs related to the copying
 19 of these documents. INTERSTATE does not contend that PEIC was not entitled to
 20 make such an evaluation, but the fact remains that it spent the \$690.69 for the
 21 copying of documents from Greene, Broillet & Wheeler, and \$1,560.64 for copying
 22 files from the law firm of Cochran, Cherry, Givens & Smith, PEIC, that served no
 23 other purpose than to educate counsel on the nature of the case. Such costs are not
 24 eligible for reimbursement. *McIlveen v. Stone Container Corp.*, 910 F.2d 1581,
 25 1584 (7th Cir. 1990) (pleadings copied solely for review by counsel were
 26 noncompensable); *Symantec Corp. v. CD Micro, Inc.*, 2005 U.S. Dist. LEXIS
 27 39432, *15 (D. Or. 2005) (costs not allowed when court could not determine what
 28 part was for attorney convenience).

1 2. **PEIC Presents No Support for the Documents Obtained by**
 2 **Greene, Broillet & Wheeler**

3 PEIC argues that some of the documents it obtained from Varner & Brant
 4 were submitted to the Court as part of its Motion for Summary Judgment against
 5 INTERSTATE. It lists examples of the documents it obtained that were included as
 6 part of its request for judicial notice. PEIC provides no evidence, beyond the
 7 statements of counsel, that these documents were actually obtained from Varner &
 8 Brandt.

9 In fact, one of the examples provided, the underlying complaints, were
 10 provided to PEIC by INTERSTATE in INTERSTATE's Rule 26 initial disclosures
 11 produced on October 31, 2007, well before PEIC requested any documents from
 12 Varner & Brandt on December 13, 2006. (See Whitfield Decl., ¶ 2.) The burden is
 13 on PEIC to provide adequate proof and specificity of the expense for which it seeks
 14 reimbursement, and here it has failed to do so. See *El Dorado Irrigation Dist.*
 15 *supra*, 2007 U.S. Dist. LEXIS 14440 at *31.

16 PEIC also fails to address the \$690.69 spent in obtaining documents from the
 17 law firm of Greene, Broillet & Wheeler. PEIC provides no explanation of any use
 18 for these documents, nor does it claim to have used any portion of them in its case,
 19 suggesting that they were merely for PEIC's own use (see above). Accordingly,
 20 those costs should not be charged to INTERSTATE. (See, e.g. *Symantec Corp. v.*
 21 *CD Micro, Inc.*, *supra*, 2005 U.S. Dist. LEXIS 39432, *15 (costs not allowed when
 22 court could not determine what part was for attorney convenience).)

23 C. **PEIC Is Not Entitled to Reimbursement For the Transcripts for**
 24 **Certain Depositions**

25 PEIC claims that it is entitled to expenses in the amount of \$319.25 and
 26 \$166.75 for the deposition transcripts of Charles Norris and Douglas Bell,
 27 respectively, as Republic Western Insurance Company's ("RWIC") persons most
 28 knowledgeable. PEIC may only obtain reimbursement for "stenographic transcript

1 necessarily obtained for use in the case.” 28 U.S.C. 1920(2); see *Evanow v. M/V*
 2 *Neptune*, 163 F.3d 1108, 1118 (9th Cir. 1998). The cost of depositions taken purely
 3 for discovery or investigative purposes, rather than for trial preparation or trial use,
 4 are ordinarily not recoverable. *Coats v. Penrod Drilling Corp.*, 5 F.3d 877,891 (5th
 5 Cir. 1993).

6 PEIC clearly had no real interest in these depositions that took place on July
 7 31, 2007, long after it filed its motion for summary judgment against
 8 INTERSTATE. PEIC appeared over telephone, and asked no questions. (See
 9 Declaration of Todd W. Baxter, ¶¶ 5-6, filed concurrently with the present Motion
 10 to Retax Costs.) Despite this minimal level of participation, PEIC now claims that
 11 it was required to get transcripts of the depositions because RWIC had alleged
 12 claims directly against PEIC.

13 At the time of the depositions, however, RWIC and PEIC had already agreed
 14 not to pursue claims against each other. Thus, PEIC had no interest in defending
 15 itself against RWIC’s claims, and therefore no interest in these depositions, because
 16 RWIC and PEIC were conducting this case under this stipulation. (Whitfield Decl.,
 17 ¶ 3.) PEIC was effectively protected from any claims RWIC had alleged in its
 18 Complaint in Intervention, leaving no purpose for PEIC to attend a deposition
 19 regarding RWIC’s claims against INTERSTATE, and incurring the costs it now
 20 wishes to charge to INTERSTATE. Further evidence of PEIC and RWIC’s
 21 agreement, and the unnecessary nature of these costs, lies in the fact that once
 22 RWIC had succeeded in its motion for partial summary judgment against
 23 INTERSTATE, it dismissed its claims with prejudice against PEIC on October 29,
 24 2007. (Whitfield Decl., ¶ 4.) RWIC never filed a motion for summary judgment
 25 against PEIC, and not once pursued any of the claims it alleged against PEIC.
 26 (Whitfield Decl. ¶ 5.) As there was no threat of ever proceeding to trial or even
 27 having to contend with a motion for summary judgment from RWIC, PEIC could
 28 not have had any purpose in obtaining these transcripts. Without a legitimate

1 purpose for incurring the costs to obtain these deposition transcripts, other than for
2 purely discovery or investigation purposes, the costs are not recoverable.

3 **III. CONCLUSION**

4 For the reasons stated above, Interstate Fire & Casualty Company hereby
5 requests that this Court grant the motion to retax costs reducing the amount of
6 taxable costs awarded by the Clerk of the Court in the amount of \$5,132.72,
7 awarding instead costs totaling \$5,896.84.

8
9 Dated: August 24, 2009

McCORMICK, BARSTOW, SHEPPARD,
WAYTE & CARRUTH LLP

10
11 By: /s/ Todd W. Baxter

12 James P. Wagoner
13 Todd W. Baxter
14 Paul J. Whitfield
15 Attorneys for Plaintiff
16 INTERSTATE FIRE & CASUALTY
COMPANY, an Illinois corporation,

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